

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

JOE ALLEN BIRDWELL, #1208969	§	
VS.	§	CIVIL ACTION NO. 9:05cv11
DIRECTOR, TDCJ-CID	§	

MEMORANDUM OPINION AND ORDER OF DISMISSAL

Petitioner Joe Allen Birdwell, a prisoner confined in the Texas prison system, brings this petition for a writ of habeas corpus challenging his conviction pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

On January 10, 2005, Petitioner filed the present petition challenging his conviction and contending that he was denied the right to appeal. On June 3, 2005, Respondent filed a Response stating that this is a successive petition and therefore should be dismissed for lack of jurisdiction or transferred to the Fifth Circuit Court. On November 10, 2005, Petitioner filed a motion to dismiss his petition without prejudice because he has decided that he received a sentence that is just punishment for his crime.

Standard

Federal Rule of Civil Procedure 41(a)(2) allows for voluntary dismissal “upon such terms and conditions as the court deems proper.” *Id.* If a court dismisses an action pursuant to Federal Rule of Civil Procedure 41(a)(2), then the court has discretion to dismiss with or without prejudice. *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 986 (5th Cir. 1989). In light of the

foregoing, it is accordingly

ORDERED that the above-styled application for writ of habeas corpus is **DISMISSED** without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2); and

ORDERED that all motions pending in this cause are **DENIED**.

So **ORDERED** and **SIGNED** this **23** day of **January, 2006**.



JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE